TENTATIVE RULINGS

FOR: November 4, 2016

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – No tentative ruling will be posted because access to records is not permitted until 60 days after the complaint is filed. Parties **must appear** for all unlawful detainer demurrers, motions to quash, and other matters. After 60 days, tentative rulings will be posted in accordance with the local rules.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to http://napacountybar.org/court-reporting-services/ for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. C (Historic Courthouse)

Scott Heathcote, et al. v. Sutter Medical Group, et al. **26-67920**

(1) DEMURRER TO THE SECOND AMENDED COMPLAINT

TENTATIVE RULING:

Defendant Dr. Hon Chan's demurrer to the fifth cause of action for statutory violation under Health and Safety Code sections 11170 et seq. drug dealer liability law on the ground of failure to state sufficient facts is OVERRULED. Plaintiffs Scott Heathcote and Brenda Sigler (collectively "plaintiffs") allege that decedent Kristopher Heathcote was injured in a motorcycle accident in 2006. (Second Amended Compl., ¶ 18.) He subsequently became addicted to the pain medications prescribed for the treatment of his injuries. (*Id*., ¶¶ 18-19.) Decedent fell into periods of addiction followed by abstinence in a cycle that continued until his death. (*Id*., ¶ 20.) In February 2012, decedent established a physician-patient relationship with Dr. Chan. (*Id*., ¶ 12.) During his visits with Dr. Chan, decedent provided cash in return for prescriptions for pain medications. (*Id*., ¶¶ 22, 27.) Dr. Chan purportedly issued the prescription solely for remuneration and without any medical justification, for no legitimate medical purpose, and in amounts far beyond therapeutic doses. (*Id*., ¶¶ 22-23, 74.) Dr. Chan prescribed numerous drugs to decedent including Hydrocodone, Oxycodone, Alprazolam, Diazepam, and Zolpidem. (*Id*., ¶¶ 68-69.) Dr. Chan illegally sold prescriptions for these drugs to decedent. (*Id*., ¶¶ 72, 75.)

Dr. Chan contends the Drug Dealer Liability Act ("DDLA") does not apply to him because Health & Safety Code section 11352 does not apply to a licensed physician prescribing medication. But plaintiffs assert Dr. Chan "wrote illegal prescriptions and that an illegal prescription is no prescription at all." (Opp. at p. 5:9-10.) As a result, plaintiffs maintain section 11352's "language

necessarily means a legitimate prescription written for a legitimate medical purpose." (*Id*. at p. 5:7-9.) This appears to be a matter of first impression as neither party raised controlling authority. The Court agrees with plaintiffs. The DDLA's purpose, the statutory language and legislative intent, and principles from analogous case law are dispositive.

The DDLA's purpose "is to enable persons injured as a consequence of the use of an 'illegal controlled substance' to recover damages from persons who participated in their marketing and to shift the cost of damages 'to those who illegally profit from that market.'" (*Whittemore v. Owens Healthcare-Retail Pharmacy, Inc.* (2010) 185 Cal.App.4th 1194, 1200, quoting Health & Saf. Code, §§ 11701-02.) Specifically, the DDLA "authorizes a user of an illegal controlled substance (and specified others) to recover damages resulting from its use from those who knowingly market the substance. It extends to substances for which a prescription is required." (*Id*. at p. 1196, citing Health & Saf. Code, §§ 11703, subd. (l), 11352.)

The DDLA "imposes liability against *all participants* in the marketing of illegal controlled substances" and that "[t]he persons who have joined the marketing of illegal controlled substances should bear the cost of the harm caused by that market in the community." (Health & Saf. Code, § 11702, subds. (a), (c), emphasis added.) Persons liable under the DDLA are those who "knowingly participate[] in the marketing of illegal controlled substances." (*Barker v. Garza* (2013) 218 Cal.App.4th 1449, 1460-61, quoting Health & Saf. Code, § 11704, subd. (a).) The only exception built into the code for "participating in the marketing of illegal controlled substances" is for "[a] law enforcement officer or agency, the state, or a person acting at the discretion of law enforcement officer or agency or the state . . . if the participation is in furtherance of an official investigation." (Health & Saf. Code, § 11704, subd. (b).) Notably absent from the exception are licensed physicians.

"'Participate in the marketing of illegal controlled substances'" is defined as "to transport, import into this state, sell, possess with intent to sell, furnish, administer, or give away, or offer to transport, import into this state, sell, furnish, administer, or give away a specified illegal controlled substance." (*Barker, supra*, 218 Cal.App.4th at p. 1461, quoting Health & Saf. Code, § 11703, subd. (g).) "Illegal controlled substances" include any substances which violate Health & Safety Code section 11352. (*Whittemore, supra*, 185 Cal.App.4th at p. 1200, citing Health & Saf. Code, § 11703, subd. (l).)

The drugs at issue for purposes of this demurrer are Hydrocodone and Oxycodone (schedule II drugs under section 11055, subdivisions (b)(1)(I) and (b)(1)(M)), and Alprazolam, Diazepam, and Zolpidem (schedule IV drugs under section 11057, subdivisions (d)(1), (d)(9), and (d)(32)), the marketing (i.e. selling) of which is made illegal by section 11352 "unless upon the written prescription of a [licensed] physician . . . ." The meaning of the phrase "unless upon the written prescription of a [licensed] physician" is the crux of the dispute when dealing with a physician who supposedly is acting beyond the normal boundaries of his license to prescribe controlled substances.

Perzik v. Super. Ct. (1991) 2 Cal.App.4th 898, raised by plaintiffs, construes language identical to that set forth in section 11352. In *Perzik*, a licensed physician sold four steroid tablets to two undercover police officers asking for the drugs to enhance their physical appearances and bodybuilding regimens. (*Id*. at p. 900.) The prosecution alleged violation of Health & Safety Code section 11379, subdivision (a), which "specifies criminal liability for every person who (among other things) 'sells, furnishes, administers, or gives away . . . any controlled substance . . . which is

not a narcotic drug . . . unless upon the prescription of a physician . . . licensed to practice in this state.'" (*Id*. at pp. 899-900, quoting Health & Saf. Code, § 11379, subd. (a).) Echoing Dr. Chan's assertion before this Court with regard to the inapplicability of section 11352, the *Perzik* physician "argued that as a licensed physician his prescriptions to the officers were exempted from the ambit of section 11379." (*Id*. at p. 901.) After analyzing the statutory language and legislative intent, the appellate court held that "a physician who prescribes and, pursuant to that prescription, sells a controlled substance without a legitimate medical purpose can be tried for violating section 11379." (*Id*. at pp. 899, 901-03.)

In conjunction with the DDLA's purpose and the statutory language and legislative intent, the Court finds *Perzik*'s reasoning persuasive when applied to section 11352. Physicians who have "lawful possession of controlled substances are not immune to prosecution if improper motives intrude." (*Id*. at pp. 901-902, citing *People v. Braddock* (1953) 41 Cal.2d 794, 800-01; see *People v. Jackson* (1951) 106 Cal.App.2d 114, 118 ["The applicable provisions of the Health and Safety Code, section 11000 et seq., do not exempt a physician from prosecution for unlawful sale of narcotics"].) Just as the criminal laws do not provide a physician with a "blanket exemption from valid criminal laws otherwise applicable to all persons," the Court concludes that a civil law (DDLA) applicable to "all participants" and "persons" similarly does not exempt a physician from civil liability for the illegal sale of controlled substances. (*Perzik, supra,* 2 Cal.App.4th at p. 902, citing *People v. Kinsley* (1931) 118 Cal.App. 593, 597-98 ["from the fact that he is a physician so licensed, it does not necessarily follow that he had the legal right under all circumstances to sell . . . narcotics"].)

The phrase "unless upon the written prescription of a [licensed] physician" in section 11379 in *Perzik* presupposed the existence of the physician-patient relationship, and what is inherent in that relationship. This inherent relationship must necessarily extend to section 11352 in the case at bar. "The most important characteristic of that relationship is the physician using best efforts and expertise to promote the patient's total health. Because the concepts of 'good faith' and 'legitimate medical purpose' are inherent limitations restricting the physician's authority to prescribe for controlled substances, the absence of express language to these effects in section [11352] is not of particular importance. . . . It would require an exceptionally strong showing for this court to accept that a physician granted the public trust of access to controlled substances should, if that trust be abused or betrayed, be treated differently from the most venal street-corner pusher." (*Id*. at pp. 902-03.) To hold otherwise would be to permit a physician, such as Dr. Chan, to freely sell controlled substances for illegitimate purposes and then be shielded from civil liability under the DDLA by simply writing a prescription. The Court does not believe that the Legislature intended such a result for a statutory framework with the goal of holding "all participants" responsible, including physicians who abuse their physician-patient relationship by selling prescriptions for "controlled substances" solely for remuneration and without any medical justification, for no legitimate medical purpose, and in amounts far beyond therapeutic doses. (Second Amended Compl., ¶¶ 22-23, 74; see *Central Pathology Serv. Med. Clinic, Inc. v. Super. Ct.* (1992) 3 Cal.4th 181, 191 [a statute should not be interpreted in a manner leading to an absurd result when construing legislative intent].)

Plaintiffs have adequately pled a cause of action with the requisite particularity. The Court has not considered Dr. Chan's argument under the Medical Injury Compensation Reform Act raised for the first time in the reply. The argument could have been raised, and properly developed, in the memorandum of points and authorities.

Dr. Chan shall file his answer within 10 calendar days of service of notice of entry of order.

(2) MOTION TO STRIKE

TENTATIVE RULING:

Defendant Dr. Hon Chan's motion to strike the claim for exemplary/punitive damages, request for attorney's fees, and the intentional tort language is DENIED. First, to the extent Dr. Chan's arguments mirror those raised in his demurrer, those arguments lack merit for the reasons stated in the Court's ruling above. Second, the confines of Code of Civil Procedure section 425.13 and *Central Pathology Serv. Med. Clinic, Inc. v. Super. Ct.* (1992) 3 Cal.4th 181, 191-92 do not apply. The allegations regarding the illegal sale of controlled substances against Dr. Chan go beyond "professional negligence of a health care provider." (Second Amended Compl., ¶¶ 22-23, 72, 74-75.) The allegations that Dr. Chan was, in effect, a drug dealer selling controlled substances for money, means "the injury for which damages are sought is [not] directly related to the professional services provided by the health care provider." (*Central Pathology Serv. Med. Clinic, Inc., supra,* 3 Cal.4th at p. 191.) Third, with regard to what Dr. Chan terms the "intentional tort language," the Court previously denied the motion to strike all intentional tort language because defendants did not present the exact language and its location in their notice of motion as required under California Rules of Court, rule 3.1322, and the attempt to cure the deficiency in the reply did not negate the mandatory language in the rule that such specificity "must" be contained in the notice of motion. Dr. Chan did not seek leave to re-raise his contentions. Having had one bite at the apple, and failed procedurally, to allow these arguments to move forward now would constitute an improper motion for reconsideration.

Dr. Chan shall file his answer within 10 calendar days of service of notice of entry of order.

Jose Segura, et al. v. General Motors LLC **26-68146**

PLAINTIFFS' MOTION TO COMPEL FURTHER DISCOVERY RESPONSES FROM DEFENDANT, AND REQUEST FOR SANCTIONS – FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

TENTATIVE RULING: Plaintiffs and Defendant are to meet and confer regarding a protective order for production of policy and procedure documents (as requested by Plaintiffs in RFP Nos. 9, 11, 18-20, and 35). The proposed protective order is to be submitted by November 29, 2016; if an agreement cannot be reached regarding the protective order, each party is to submit their own version by November 29, 2016. The hearing on Plaintiffs' Motion is continued to December 8, 2016 at 8:30 a.m. in Dept. C.

PROBATE CALENDAR – Hon. Rodney Stone, Dept. F (Criminal Courts Bldg.-1111 Third St.)

Conservatorship Charles L. Dubin **26-62097**

REVIEW HEARING

TENTATIVE RULING: The matter is continued to December 2, 2016, at 8:30 a.m. in Dept. F to allow the conservator to file: (1) Notice of Conservatee's Rights (Judicial Council form GC-341); and (2) Determination of Conservatee's Appropriate Level of Care (Judicial Council form GC-355).